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No. 692

In the Supreme Court of the United States

OCTOBER TERM, 1959

UNITED STATES OF AMERICA, PETITIONER

vs.

GEORGE MAX CHARLES WOLFF

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

J. LEE RANKIN,
Solicitor General,
MALCOLM R. WILKEY,
Assistant Attorney General,
BERTRAM ROSENBERG,
Attorney,
Department of Justice,
Washington 25, D. C.

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The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Third Circuit affirming an order of the District Court for the Eastern District of Pennsylvania admitting respondent to citizenship.

OPINIONS BELOW

The opinion of the court of appeals (App. *infra*, pp. 11-16) is reported at 270 F. 2d 422. The opinion of the district court (R. 22-26) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on September 16, 1959 (App., *infra*, p. 17). On December 12, 1959, Mr. Justice Brennan extended the

time for filing a petition for a writ of certiorari to and including February 13, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, when the entire five-year period preceding a petition for naturalization falls after the effective date of the Immigration and Nationality Act of 1952, the residence requirements of the 1952 Act determine eligibility for naturalization, or whether the application may be considered under the Nationality Act of 1940 merely because the applicant lived in the United States prior to the effective date of the 1952 Act and prior to the five years preceding naturalization.

STATUTES INVOLVED

The Immigration and Nationality Act of 1952, 66 Stat. 163, 8 U.S.C. 1101 *et seq.*, provides in pertinent part as follows:

Section 316(a), 8 U.S.C. 1427(a):

> No person, except as otherwise provided in this title, shall be naturalized unless such petitioner, (1) immediately preceding the date of filing his petition for naturalization has resided continuously, after being lawfully admitted for permanent residence, within the United States for at least five years and during the five years immediately preceding the date of filing his petition has been physically present therein for periods totaling at least half of that time. * * *.

Section 405, 8 U.S.C. 1101 note:

(a) Nothing contained in this Act, unless otherwise specifically provided therein, shall be construed to affect the validity of any declaration of intention, petition for naturalization, * * * or other document or proceeding which shall be valid at the time this Act shall take effect; or to affect * * * any status, condition, right in process of acquisition, act, thing, * * * or matter, * * * done or existing, at the time this Act shall take effect; but as to all such * * * statutes, conditions, rights, acts, things, * * * or matters the statutes or parts of statutes repealed by this Act are, unless otherwise specifically provided therein, hereby continued in force and effect. * * *

(b) Except as otherwise specifically provided in title III, any petition for naturalization heretofore filed which may be pending at the time this Act shall take effect shall be heard and determined in accordance with the requirements of law in effect when such petition was filed.

* * * * *

The Nationality Act of 1940, 54 Stat. 1137, 8 U.S.C. (1946 ed.) 501 *et seq.*, as amended, provided in pertinent part:

Section 307(a), 8 U.S.C. (1946 ed.) 707(a):

No person, except as hereinafter provided in this Act, shall be naturalized unless such petitioner, (1) immediately preceding the date of filing petition for naturalization has resided continuously within the United States for at least

five years and within the State in which the petitioner resided at the time of filing the petition for at least six months, (2) has resided continuously within the United States from the date of the petition up to the time of admission to citizenship * * *

Section 331, 8 U.S.C. (1946 ed., Supp. V) 731:

An applicant for naturalization shall make, under oath before, and unless prevented by sickness or other physical disability only in the office of, the clerk of court or such clerk's authorized deputy, regardless of the place of residence in the United States of the applicant, not less than two nor more than seven years at least prior to the applicant's petition for naturalization, and after the applicant has reached the age of eighteen years, a signed declaration of intention to become a citizen of the United States, which declaration shall be set forth in writing, in triplicate * * *.

Section 332, 8 U.S.C. (1946 ed., Supp. V) 732:

(a). An applicant for naturalization shall, not less than two nor more than seven years after such declaration of intention has been made, make and file in the office of the clerk of a naturalization court, in duplicate, a sworn petition in writing * * *.

STATEMENT

The respondent, a native of Germany and a citizen of Argentina, was admitted for permanent residence in the United States in April, 1948 (R. 1). He filed a declaration of intention to become a citizen on Sep-

tember 17, 1948 (R. 2-5), but did not apply for citizenship within seven years thereafter. His petition for naturalization was filed on July 10, 1958 (R. 6-11). The form which respondent signed contained an averment that he had been physically present in the United States for at least one-half of the five-year period immediately preceding the date of the petition (R. 9), but respondent's lists of arrivals and departures (R. 8) showed that he had been physically present in the United States for periods totaling only a little over nine months in the five-year period immediately preceding his petition. Respondent's absence was due to his employment as a sales representative in Mexico and South America for an American firm (R. 14).

The naturalization examiner filed objections to respondent's naturalization, pointing out that his 1948 declaration of intention had lapsed since not followed by a petition for naturalization within seven years (as required by Sections 331 and 332 of the Nationality Act of 1940, *supra*, p. 4); and that respondent did not meet the physical residence requirements of the Immigration and Nationality Act of 1952 for the five-year period immediately preceding his naturalization (R. 13-21).

The district court nevertheless admitted respondent to citizenship, holding that, since respondent had resided in the United States prior to the effective date of the 1952 Act (December 24, 1952), by virtue of the savings clause of that Act (Section 405, *supra*), his eligibility for naturalization was determined by the residence requirements of the 1940 Act.

The court of appeals affirmed the judgment of the district court. It recognized that respondent's declaration of intention had lapsed under the 1940 Act, but ruled that under this Court's decision in *United States* v. *Menasche*, 348 U.S. 528, he was nevertheless entitled to have his petition considered under the 1940 Act since he had resided in the United States before the effective date of the 1952 Act. The court noted that the result "is somewhat anomalous and it can be argued that this court is giving to Wolff the benefits of those provisions of both the 1940 Act and the 1952 Act which serve his purpose to acquire citizenship despite the fact that he is unable to literally comply with the provisions of either Act but we think the result is compelled by *Menasche*."

REASONS FOR GRANTING THE WRIT

The court of appeals has misinterpreted this Court's decision in *United States* v. *Menasche*, 348 U.S. 528, in a way which will engender confusion and disharmony in the application of the naturalization laws for years to come. The significant fact, which the court of appeals disregarded, is that under both the 1940 Act and the 1952 Act it is only the five-year period immediately preceding naturalization which is of importance in determining eligibility for naturalization. Here, unlike the situation in *Menasche*, the entire five-year period of residence preceding respondent's petition for naturalization occurred after the effective date of the 1952 Act. Respondent's application should therefore properly have been considered under the 1952 Act which was in effect throughout the determinative period.

In *Menasche*, this Court had before it an applicant who had filed a declaration of intention before the 1952 Act became effective and who already had 56 months of residence qualifying under the 1940 Act at the time the 1952 Act became effective. Four months later, having completed five years of residence, within seven years after his declaration of intention, Menasche applied for citizenship in April 1953. It is in that context that this Court's dictum, on which the court below relied, must be read. The Court said, 348 U.S. at p. 536:

> It could be argued in the present case that it was Menasche's residence, rather than his filing of the declaration, which gave rise to his rights under Section 405(a). And this approach would have the virtue of eliminating the inequitable treatment envisaged by the Government as regards those special groups of aliens who did not have to file declarations as a prerequisite to citizenship.[1] But while our decision could be rested on this ground, it is sufficient here merely to refer to the provision in Section 405(a), derived verbatim from Section 347(a) of the 1940 Act, preserving the "validity" of declarations of intention "valid at the time this Act shall take effect."

Giving this dictum as to residence its full effect, it means, we believe, no more than that, if any qualify-

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[1] This statement was in answer to the government's argument that Congress could not have intended to make the 1940 Act applicable to persons required to file a declaration of intention if that Act was not available to special classes, such as veterans, who were exempt from the declaration requirement under the 1940 Act.

ing period of residence had commenced to run before the effective date of the 1952 Act, the savings clause of the 1952 Act would operate to preserve the rights accruing from *that* residence under the former Act.[2] Thus, at most, under that dictum, any applicant whose five-year period of residence immediately preceding his petition for naturalization commenced before the effective date of the 1952 Act (December 24, 1952)—in short, any applicant who petitioned for naturalization before December 24, 1957—could have his citizenship determined under the 1940 Act. And, of course, an applicant who had filed a declaration of intention under the 1940 Act could under *Menasche* have his application determined under the 1940 Act so long as his petition was filed within seven years of the declaration. But where, as here, the declaration of intention has been allowed to lapse, and where the entire five-year period of residence relied upon to establish eligibility for citizenship falls after the effective date of the 1952 Act, there is nothing upon which the savings clause of the 1952 Act can operate. Neither the declaration of intention nor the residence prior to the five-year period has any significance in relation to the petition for naturalization filed, in this case, in 1958.

Such an interpretation fully protects any rights that can be said to have started to accrue before the 1952 Act went into effect. At the same time, it fixes a rea-

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[2] See *Shomberg* v. *United States*, 348 U.S. 540, 543, decided the same day as *Menasche*, where the Court said:

> We agree with petitioner that, absent a specific provision to the contrary, he has rights protected by § 405 (a). These stem from the filing of his Form N-400, from his petition for naturalization, and perhaps, *from his fulfillment of the five-year residence requirement*. • • •. [Emphasis added.]

sonable end to the period when naturalization will be administered under a dual set of laws. The purpose of the 1952 Act was to "repeal all immigration and nationality laws and to enact a completely revised immigration and nationality code" (S. Rep. No. 1137, 82d Cong., 2d Sess., p. 1). Under the interpretation of the court below, however, the 1940 Act will remain in effect so long as there is an alien alive who resided in the United States for any period of time before the 1952 Act became effective, even though he does not apply for citizenship until the year 2000 and even though admittedly the only relevant period of residence in such a case, under the standards of either Act, would be the period from 1995 to 2000.

For that reason, the question presented has continuing importance. The far-reaching interpretation of the 1952 Act's savings clause as basing rights upon mere residence in the United States prior to 1952, even though the residence is long prior to any controlling period in relation to the relief sought, could result in confusion and inequality of treatment, not only with respect to naturalization, but to deportation as well, since the savings clause applies to all aspects of the 1952 Act. The district courts have already shown considerable confusion as to the application of the savings clause and the *Menasche* dictum,[3] and a case similar

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[3] *Petition of Rosenbaum*, 171 F. Supp. 141 (S.D. N.Y.); *Petition of Zaharia*, 166 F. Supp. 314 (S.D. N.Y.); see also *In re Pinner's Petition*, 161 F. Supp. 337, 341 (N.D. Cal.). Other cases involving application of the *Menasche* dictum present the factual situation that part of the five-year residence preceding naturalization antedated the 1952 Act. *Aure* v. *United States*, 225 F. 2d 88 (C.A. 9); *Petition of Kaufteil*, 152 F. Supp. 538 (S.D. N.Y.); *Petition of Pauschert*, 140 F. Supp. 485 (S.D. N.Y.).

to the instant one is now pending before the United States Court of Appeals for the Second Circuit. *Petition of Medalion*, 173 F. Supp. 249 (S.D. N.Y.), presently on appeal by the government. That uncertainty will continue, we think, until the implications of this Court's dictum in *Menasche* have been clarified, and that can be done authoritatively only by this Court.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

J. LEE RANKIN,
Solicitor General.

MALCOLM R. WILKEY,
Assistant Attorney General.

BEATRICE ROSENBERG,
Attorney.

FEBRUARY, 1960.

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 12,888

IN THE MATTER OF PETITION FOR NATURALIZATION OF GEORGE MAX CHARLES WOLFF

UNITED STATES OF AMERICA, APPELLANT,

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued June 12, 1959

Before BIGGS, *Chief Judge*, and McLAUGHLIN and STALEY, *Circuit Judges*

OPINION OF THE COURT

(Filed September 16, 1959)

By BIGGS, *Chief Judge*.

The appellee, Wolff, a native of Germany, was admitted for permanent residence in the United States in April 1948 and filed a declaration of intention to become a citizen of the United States on September 17, 1948, pursuant to the provisions of Section 331 of the Nationality Act of 1940, 8 U.S.C. Section 731 (1946 ed.). That statute provided that a petition for naturalization had to be filed within seven years of the date of filing of a declaration of intention or a petition for naturalization could not validly be filed. Wolff did not file a petition for naturalization until July 16, 1958. The Nationality Act of 1940 was repealed by the Immigration and Nationality Act of 1952, 8 U.S.C.A., Section 1101 *et seq.*, and Section 334(f) of that Act, 8 U.S.C.A.

Section 1445(f) dispensed with the filing of a declaration of intention as a prerequisite to citizenship.

The 1952 Act worked other changes in respect to requisites for admission to citizenship. It provided for five years residence in the United States by the applicant and also that the applicant must be physically present therein for at least two and one half years prior to the filing of his petition for naturalization. 8 U.S.C.A., Section 1427. It is conceded by Wolff that he cannot meet the latter requirement since he has been physically present in the United States for only about nine months in the five years preceding the filing of his petition.[1] An Examiner of the Immigration and Naturalization Service deemed this fact to bar Wolff from citizenship. Wolff sought review in the court below which held he was entitled to citizenship. F. Supp. (19). The appeal at bar followed.

Wolff contends that by virtue of the provisions of Section 405(a) of the 1952 Act, 8 U.S.C.A., Section 1101 note, the so-called "savings clause", he acquired a "status", a "condition" or "right in process of acquisition", which validates his petition for naturalization and entitles him to citizenship. Section 405(a) provides: "Nothing contained in this Act, unless otherwise specifically provided therein, shall be construed to affect the validity of any declaration of intention, petition for naturalization, certificate of naturalization, certificate of citizenship, warrant of arrest, order or warrant of deportation, order of exclusion, or other document or proceeding which shall be valid at the time this Act shall take effect; or to affect any prosecution,

[1] The reason for this is that Wolff is and was employed as a salesman for an American locomotive company in South America and spends much of his time there.

suit, action, or proceedings, civil or criminal, brought, or any status, condition, right in process of acquisition, act, thing, liability obligation, or matter, civil or criminal, done or existing, at the time this Act shall take effect; but as to all such prosecutions, suits, actions, proceedings, statutes [*sic*[2]], conditions, rights, acts, things, liabilities, obligations, or matters the statutes or parts of statutes repealed by this Act are, unless otherwise specifically provided therein, hereby continued in force and effect. . . ."

Wolff's contention is based on language in the opinion in United States v. Menasche, 348 U.S. 528, 536 (1955) as follows: "It could be argued in the present case that it was Menasche's residence, rather than his filing of the declaration, which gave rise to his rights under Section 405(a). And this approach would have the virtue of eliminating the inequitable treatment envisaged by the Government as regards those special groups of aliens who did not have to file declarations as a prerequisite to citizenship. But while our decision could be rested on this ground, it is sufficient here merely to refer to the provision in Section 405(a), derived verbatim from Section 347(a) of the 1940 Act, preserving the 'validity' of declarations of intention 'valid at the time this Act shall take effect.'"

The argument advanced by Wolff and accepted by the court below runs as follows, as we grasp it. Menasche was admitted for permanent residence in the United States on March 7, 1948, and in the following month filed his declaration to become a citizen. He was absent from the United States for various periods, aggregating some forty-four months, but he did not at any time abandon his American residence. Under the National-

[2] Undoubtedly, the word intended was "statuses".

ity Act of 1940 he would have been entitled to have been naturalized on completing five years of residence on March 7, 1953. But before this five year period could elapse the Immigration and Nationality Act replaced the 1940 Act on December 24, 1952. The 1952 Act imposed the necessity of physical presence for at least one half of the five year residence period. It was clear, therefore, as was said in *Menasche*, that if the 1952 Act applied to his case he could not be naturalized while if the provisions of the 1940 Act were applicable he was eligible for citizenship. The Supreme Court, however, stated categorically, albeit by way of dictum, that a decision in Menasche's favor could have been rested on residence rather than the filing of a declaration of intention.

Wolff asserts that because he has met the residence requirements of the 1940 Act he is entitled to citizenship, despite the fact that he cannot meet the physical presence requirement of the 1952 Act and did not file his petition for naturalization within the seven years required by the 1940 Act. Phrasing his contentions in another way, he states, in substance, that his residence in the United States gives him status, a right to citizenship in process of acquisition, and that under *Menasche* it is residence that counts. Thus, says Wolff, does Section 405(a) preserve his right to citizenship.

The United States asserts, however, that while Section 405(a) preserves status for citizenship and rights in process of acquisition under the 1940 Act, Wolff's rights have been lost because he failed to file his petition for naturalization within seven years of the time of filing his declaration. In other words says the United States, Wolff's right to proceed to citizenship under the 1940 Act has been lost for failure to comply with the seven-year proviso of that statute. He must, therefore, proceed under the 1952 Act and he cannot meet the physical presence requirement of that statute.

The decision of the Supreme Court in *Menasche*[3] seems to require a result different from that contended for by the United States. Mr. Justice Clark stated in the Menasche opinion, quoted above, that the decision of the Court could be based on Menasche's residence rather than on the filing of his declaration of intention to become a citizen and that it was residence rather than the filing of the declaration which gave rise to his rights under Section 405(a). If we correctly construe the dictum in *Menasche* it would mean that residence alone must be deemed to be a status, an essential part of a right to citizenship in process of acquisition and that anyone who had acquired residence under the 1940 Act may proceed under that statute to citizenship. It follows that since Wolff possesses residence status under the 1940 Act,[4] and residence was stated in *Menasche* as being the basis upon which the decision in that case could have been rested, it is our opinion that Wolff is entitled to citizenship. Strict compliance with the 1940 Act would, of course, require him to file a new declaration of intention and then wait two years before filing his petition for naturalization. But this would seem to be a futility under the circumstances of the case at bar in view of the fact that the 1952 Act has dispensed with the requirement of declaration of intention to become a citizen.

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[3] Menasche had complied with all of the provisions of the 1940 Act. He had filed his petition for naturalization within the time prescribed by that statute. It is in this respect only that the circumstances of the case at bar differ substantially from those of *Menasche*.

[4] See 8 U.S.C. § 707 (1946 ed.) which provides in part:

"(a) No person except as hereinafter provided in this chapter, shall be naturalized unless such petitioner, (1) immediately preceding the date of filing petition for naturalization has resided continuously within the United States for at least five years . . ."

The result we concede is somewhat anomalous and it can be argued that this court is giving to Wolff the benefits of those provisions of both the 1940 Act and the 1952 Act which serve his purpose to acquire citizenship despite the fact that he is unable to literally comply with the provisions of either Act but we think the result is compelled by *Menasche*.[5]

That the United States is entitled to maintain its appeal to this court from the decree of naturalization despite the delivery of a certificate of citizenship to Wolff is so well established that no extensive citation of authorities is necessary in support of that proposition. But see United States v. Morena, 245 U.S. 392 (1918) and United States v. Ovens, 13 F.2d 376 (4 Cir. 1926).

The judgment will be affirmed.

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[5] See 8 U.S.C. § 731 (1946 ed.)

We are, of course, troubled by the statement in *Menasche*, 348 U.S. at p. 530: "Thus, if the 1952 Act applies to respondent's case, it is clear that he may not be naturalized, while under the 1940 Act he is admittedly eligible for citizenship." It should be borne in mind, however, as Mr. Justice Clark pointed out in connection with the application of Section 405(a), 348 U.S. at p. 538, that "'The cardinal principle of statutory construction is to save and not to destroy' " citing Labor Board v. Jones & Laughlin Steel Corp., 301 U.S. 1, 30 (1927). Mr. Justice Clark went on to say: "It is our duty 'to give effect, if possible, to every clause and word of a statute.' " citing Montclair v. Ramsdell, 107 U.S. 147, 152 (1882).

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 12,888

In the Matter of the Petition for Naturalization of GEORGE MAX CHARLES WOLFF

UNITED STATES OF AMERICA, APPELLANT

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: BIGGS, Chief Judge, and MCLAUGHLIN and STALEY, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said District Court in this case be, and the same is hereby affirmed.

Attest:

IDA O. CRESKOFF,
Clerk.

September 16, 1959

Received & Filed September 16, 1959. Ida O. Creskoff, Clerk.

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